

Case No.:
U-II-1/09-10

Date:
5 May 2009

THE CONCURRING OPINION OF JUDGE DR. RIBIČIČ IN CASE No. U-II-1/09

I agree with the adopted decision that unconstitutional consequences could occur due to the rejection of the Act Amending the Lawyers Act, and with its reasoning. With reference to such, I find it essential that the Constitutional Court did not explore the question of how the calling of a referendum and a decision adopted at the resulting referendum could interfere with the position of the Bar itself, but rather explored the question of whether the rejection of the amendment of the Act could interfere with the human rights of those who are represented by lawyers. This is immediately obvious from the decision, as the Constitutional Court brings into the foreground the question of ensuring legal aid and establishes that the regulation in force does not guarantee that comprehensive and effective services are ensured to persons entitled to legal aid (paragraph 15). It must be taken into consideration that in such cases the rights of those persons who cannot pay for these services themselves due to their weak financial situation are infringed. However, also in the part of the decision in which the Constitutional Court reviews possible interferences with the Bar as an autonomous and independent service (paragraph 24 et sub.), a basis for the review are not the rights and even less so the privileges of lawyers, but concern for the interests of those who are represented by lawyers in judicial proceedings, especially in criminal proceedings. Lawyers serve to protect the human rights and fundamental freedoms of their clients, and only in this function do they deserve that their autonomy and independence be protected. Personally, I am not convinced that the Act Amending the Lawyers Act appropriately regulated both of the above-mentioned questions, however, it must nevertheless be admitted that it remedied the unconstitutionality of the statutory regulation in force in a constitutionally consistent manner.

The Constitutional Court was in a difficult position when deciding also because of the systemic deficiencies of the regulation of referendums. I have in mind the regulation regarding which the Constitution very broadly recognises the right to a referendum, while the Constitutional Court is put in a position in which it has to arbitrate whether unconstitutional consequences would occur in a concrete case. Therefore, I do agree with paragraph six of the reasoning, in which the legislature is called on to analyse the regulation of referendums. In a constitutional democracy, as a general rule, it is disputable that deciding on a matter at a referendum such that unconstitutional consequences would result is not allowed. [1] However, I am in favour of such a systemic regulation which would more evenly distribute the accountability for preventing unconstitutional referendums between the constitutional framer, the legislature, and the Constitutional Court, and would not assign this thankless role solely to the Constitutional Court.

The decision making of the Constitutional Court is particularly demanding because (following the abolishment of the institution of the preliminary referendum) at a

subsequent legislative referendum it is possible to decide only in favour or against the entire law. I understand the above-mentioned call as a warning that it would be reasonable to enable voters to decide on individual, particularly important issues, e.g. within the framework of a repealing referendum. The Constitutional Court will otherwise very often face the same difficulty as at this time, namely, that it must in a short time comprehensively analyse possible effects of numerous provisions of laws that would be as a whole the subject of a subsequent referendum. It is in the nature of things that it is difficult to carry out a people's referendum regarding the entire text of a law, such as the Act Amending the Lawyers Act, in the event of which it is very difficult to decide on the mutual effect of numerous provisions and their external effects. If such systemic changes do not take place, this could render a referendum impossible, as only one single provision that could lead to unconstitutional consequences would render the calling of a referendum impossible.

Dr. Ciril Ribičič
Judge

[1] With reference to such, let me cite my dissenting opinion in Case U-II-1/06, which cannot be understood as a principled opposition to the possibility of limiting referendums: "A classical conception of majority democracy needs a necessary correction in modern democratic systems. A majority, be it parliamentary or a majority reached at a referendum, may not abuse its power for interferences with the attained level of the protection of human rights and freedoms and especially not with the attained position of all minorities and political opposition. In this I see the essence of constitutional democracy, in which the will of a democratic majority is limited and cannot interfere with fundamental constitutional values". This starting-point entails the uniform position of the Constitutional Court judges, who in Decision No. U-I-111/04, dated 8 July 2004 (Official Gazette RS, No. 77/04 and OdlUS XIII, 54) underlined the following: "In the Republic of Slovenia, a constitutional democracy was established, the essence of which is that the values protected by the Constitution, including, in particular, human rights and freedoms (the preamble to the Constitution), can prevail over the democratically adopted decisions of the majority. Concerning such, in reviewing the admissibility of referendum deciding, the Constitutional Court must take into consideration that it is not allowed that decisions which would be inconsistent with the Constitution are adopted at a referendum."